



US Army Corps
of Engineers

Construction Bulletin

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Subject: Prompt Payment Act

Applicability: DIRECTIVE

1. This bulletin is a continuation of the policies and procedures established in Construction Bulletins 89-3 and 91-3 and contains responses to many of the issues raised by our field offices regarding the Prompt Payment Act Amendments of 1988 (PPA88). Public Law 100-496, the Prompt Payment Act Amendments of 1988, significantly changed the bill paying practices of the Federal Government. These changes apply to contracts awarded, contracts renewed, and contract options exercised after March 31, 1989.

2. FAR Clause 52.232-27 (APR 1989) incorporated the provisions of the Prompt Payment Act Amendments of 1988 by requiring that contract payments be made within 14 days of receipt of the payment request by the designated billing office. Each construction contract management office should be familiar with the provisions of this FAR clause. This clause contains provisions applicable specifically to construction contracts. The following paragraphs synopsize the construction contract payment requirements and reiterate USACE policy and procedures for implementation of the new regulations.

a. The "designated billing office" is defined as the office or person designated in the contract to first receive the contractor's invoice or request for payment. In most cases, the designated billing office will be the area, resident or project office that is administering the construction contract and should be so named in the contract. Add this item to your BCO review checklist.

b. The payment "clock" starts to run on the date that a "proper invoice" is received at the designated billing office. (The law also provides for starting the clock upon "constructive

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acceptance," but this only applies to construction in cases of final payments and payments for partial deliveries that have been accepted by the government and are priced separately in the contract.) Each invoice shall be date stamped on its face immediately upon receipt by the office or individual named in the solicitation. If the designated billing office fails to stamp the invoice with the actual date of receipt, the "clock" starts on the date of the invoice.

c. A "proper invoice" is defined by FAR clause 52.232-27(a)(2) and must include, among other items, "substantiation of the amounts requested and certification in accordance with the requirements of clause 52.232-5." Payment will not be made without the following: (1) Contractor substantiation of the amounts requested; (2) Certification that previous amounts were expended in accordance with the contract; (3) Certification that subcontractors and suppliers have been paid from previous payments and will be paid promptly for the payment requested; (4) Certification that the prime contractor's payment request does not include any amounts to be withheld or retained from a subcontractor. The certification must appear exactly as stated in the aforementioned clause and be fully executed by the contractor. The degree of substantiation required will depend upon the type of work involved and will be left to the discretion of the Administrative Contracting Officer (ACO). In most cases, however, an update of the approved contract price breakdown indicating itemized completion percentages that were established by mutual agreement between Government and contractor project personnel would constitute substantiation of work-in-place.

d. If an invoice is found to be improper or defective, as defined by 52.232-27(a)(2), the contractor must be notified of the defect within 7 days after receipt of the invoice. It is recommended that the initial notification be placed telephonically (see clause 52.232-27(a)(2)(vii) and then confirmed in writing. The "clock" is effectively stopped upon notification of the defect and the whole process starts over with the resubmission of the corrected invoice. Disagreement between the Government and the contractor over the payment amount, issues of contract compliance or retainage does not form the basis for finding the invoice to be defective and requiring resubmission,

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but it does stop the clock. However, since clause 52.232-27(a)(2)(iv) states that "Interest penalties are not required on payment delays due to disagreement....", it is imperative that the ENG Form 93 be annotated to document the delay and alert the designated payment office not to pay interest during the delay period.

e. If the Government takes longer than 7 days to notify the contractor of an invoice defect, the subsequent payment period for processing the corrected invoice is shortened by the number of days that the government exceeded the 7 day requirement (e.g., if the specified due date is 14 days after receipt, and the Government takes 10 days to notify the contractor of a defect, payment of the corrected invoice is due 11 days after receipt).

f. The due date for progress payments shall be 14 days after receipt of a proper payment request. This requirement is contained in P.L. 100-496 and is not subject to negotiation. The law does provide for making a determination as to a contract or class of contracts and specifying, in the solicitation, "a period longer than 14 days if required to afford the Government a practicable opportunity to adequately inspect the work and to determine the adequacy of the contractor's performance...." The Office of Management and Budget (OMB) Circular A-125 states that, "extended payment periods would not be appropriate... for the mere convenience of Government employees, or to avoid any possibility of making late payment." In order to carry out the congressional intent, determinations to specify longer payment periods shall be made by the Contracting Officer and shall be documented by written justification in the contract file. Current feedback from the field indicates that where ENG Form 93's are transmitted electronically to the payment office, the "50 percent rule" (in the payment office by close of business on the day that represents half the pay period, or in this case, the 7th day) can usually be met.

g. The release of retained amounts shall be based on the Contracting Officer's determination that satisfactory progress has been made. Payment is due within 30 days, or other specified period, after release is approved.

h. On final payments, we don't have the latitude of specifying a longer payment period. Payment is due either the 30th day after receipt of the invoice or the 30th day after

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Government acceptance of the work, whichever is later. Where final payment is subject to settlement actions (e.g., release of claims), acceptance is deemed to have occurred on the effective date of settlement. The final payment requirements represent the greatest departure from our current practices and will require some administrative innovation on the part of all parties involved. We need to look at things like advance actions on contractor performance ratings, labor and property clearances and the use of "shotgun" coordination when processing final payments.

i. If a contractor is overpaid (his performance is later found not in conformance with the contract specifications or he has held retainage from a subcontractor and was paid the full amount), the Government is entitled to interest, and the interest must be deducted from the next available payment to the contractor.

j. Another major provision is the addition of some very detailed requirements applying to the payment of subcontractors. The highlights are:

(1) The provisions flow down to subcontractors and suppliers at all tiers. The prime contractor must include a contract clause requiring each of its subcontractors to flow down these same requirements to each of their subcontractors.

(2) Contractors and subcontractors must pay their subcontractors within 7 days of receipt of their respective payment. They may not specify longer payment periods in their subcontracts.

(3) Contractors and subcontractors must pay interest to their subcontractors for payments made after the due date (7th day).

(4) Interest that the contractor pays a subcontractor cannot be charged to the government.

(5) The Contracting Officer must be provided copies of retainage and withholding notices issued to subcontractors.

(6) Contracting Officers must respond immediately to subcontractor complaints of nonpayment. When contracts are administered by an ACO, the ACO is primarily responsible for

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receiving subcontractor nonpayment complaints, investigating the basis of the complaint, consulting with the Contracting Officer (CO), and deciding how best to deal with the situation. The ACO should immediately inform the prime contractor of a subcontractor complaint of nonpayment, determine the legitimacy of the complaint, encourage the contractor to make timely payment, and consider if additional actions need to be taken to protect the Government's interests. The Contracting Officer should also determine if any certifications made by the contractor were inaccurate in any material respect.

(7) For a construction contract, the prime contractor is required to certify that its payment request does not include any amounts which it intends to withhold or retain from a subcontractor in accordance with the terms and conditions of the subcontract (FAR 52.232-5(c)(3)). Additionally, the prime contractor is required to provide a written notice of any subcontractor payment withholding, including the reason for the withholding and the remedial actions to be taken by the subcontractor in order to receive payment (FAR 52.232-27(g)), and the prime contractor may not request payment from the Government of amounts withheld until the contractor certifies to the Contracting Officer either that the subcontractor is entitled to payment of previously withheld amounts or the work has been performed by another party (FAR 52.232-27(h)).

k. If the Contracting Officer finds that a contractor's certification is inaccurate in any material respect because a subcontractor has not been paid, the Contracting Officer should consult with legal counsel on whether a false certification has been made and determine if the matter should be referred to higher authority.

3. The following additional determinations have been coordinated with the Office of the Chief Counsel, Directorate of Resource Management and Principal Assistant Responsible for Contracting and represent official USACE policy.

a. The PPA88 does not apply to Blanket Purchase Agreements or Indefinite-Delivery Contracts awarded prior to 1 April 1989 even though it would apply to orders placed against those contracts after 1 April 1989.

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b. In order to further define the difference between defective invoices and disagreements over payment amounts, the following examples are given:

Example 1. The contractor's invoice is received at the designated billing office, reviewed and found to be missing the certification, signature on the certification, breakdown to substantiate the amount requested or any other documentation required by FAR 52.232-27(a)(2) and OMB Circular A-125, MP-CEMP-paragraphs 5.b. and 5.d. The invoice is considered defective, the contractor is immediately notified and the payment clock is stopped upon notification. The defective invoice is returned to the contractor and the entire process starts over with the resubmission of the invoice. Guidance contained in paragraph 2.e. applies to the payment period for the subsequent invoice.

Example 2. The contractor's invoice is received in the designated billing office, reviewed and found to contain all of the documentation referenced in Example 1 and is considered to be a proper invoice. At some time during the payment period, the Government finds that it cannot approve payment of the invoice due to issues of quality, quantity or compliance with contract requirements. The contractor is immediately notified of the disagreement and of necessary actions to resolve the issues. In some cases, the disagreement can be resolved through telephonic discussions. In other cases, a revised invoice with corrected percentages or payment amounts will be in order. The dates marking the beginning and ending of the delay due to this disagreement are documented and annotated on the receiving report (ENG Form 93), so that the paying office does not pay interest on the delay period. The provisions of FAR 52.232-27(a)(4)(iv) apply and, in effect, temporarily suspend the payment clock rather than stopping and resetting it.

c. While some contractors may voluntarily comply with local practices by submitting a completed ENG Form 93 as their invoice, there is no requirement to do so. In order to avoid confusion about the source of defects, it is recommended that contractor invoices and Government receiving reports be distinctly separate documents.

d. The designated billing office alone is responsible for determining that the invoice is "proper" and for reaching agreement with the contractor on the amount of payment. There is

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no need to forward a copy of the contractor's invoice and certification to the paying office as long as the billing office has indicated on the ENG Form 93 that a proper invoice has been received.

e. In accordance with AR 37-1 electronic facsimiles of a signed Government receiving report (ENG Form 93) are acceptable for making payments.

f. A contract modification is not used to pay interest. The paying office should provide a copy of remittance advice (interest data) to the billing office at the time of disbursement.

g. In the case where the contractor wins litigation over a claim, the contractor may be entitled to interest under the Prompt Payment Act and the Contract Disputes Act, although not for concurrent periods. The Prompt Payment Act (31 USC 3906) and OMB A-125, para. 13.a. and your legal counsel can provide guidance in this area.

h. There is no distinction between physical and administrative work items within the language of the Prompt Payment Act. Until all contract work has been completed, including submissions of record drawings, warranty documents, maintenance instructions, etc., constructive acceptance has not occurred. On a final invoice where a "release of claims" is required, the effective date of settlement (date 30 day clock starts) is the latter of the dates the Government receives the signed release or final ENG Form 93 from the contractor. This applies to AE and construction contracts.

4. The current guidance in this area is still being reviewed, however the Corps is generally not permitted to use General Expense (GE) funds for PPA interest penalties incurred for late payments citing Civil Works appropriations. Late payment interest penalties are to be paid from the appropriation and cost numbers cited in the contract or, if the contract cites the Revolving Fund, the appropriations to which Revolving Fund costs are being distributed. A PPA interest penalty resulting from a late payment citing reimbursable funds may be paid from the responsible activity's applicable overhead account if all of the following conditions exist:

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a. There are insufficient funds on the reimbursable order to pay the interest penalty.

b. The late payment will be the final charge against the reimbursable order.

c. The interest penalty does not exceed \$100. This change applies to payments from both Military and Civil Works appropriations.

5. This Construction Bulletin has been fully coordinated with the following HQUSACE organizations: Office of the Chief Counsel (CECC-C), Directorate of Resource Management (CERM-FP), Principal Assistant Responsible for Contracting (CEPR-ZA), Operations, Construction and Readiness Division (CECW-O), and represents official policy to be implemented by all USACE elements involved with construction contracts. My point of contact for any questions is the Construction Policy Branch at (202) 272-1486.



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